No. 14,915

IN THE

United States Court of Appeals

For the Ninth Circuit

FLORENCE ALICE PAQUET,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

APPELLANT'S ANSWERING BRIEF.

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Answering appellee's argument in reply to appel-t's several claims of error in the Court below, the lowing is respectfully submitted:

I.

EXHIBIT 1.—THE CERTIFICATE OF NON-EXISTENCE OF CITIZENSHIP RECORD.

Appellee treats Exhibit 1 as if it consisted of the tificate of non-existence of citizenship record only.

Exhibit 1 is in two parts, namely: (1) a certification the Assistant Commissioner, Administrative Di-ion, Immigration and Naturalization Service, E. A.

Loughran, (hereinafter, for convenience's sake, referred to as the "Loughran certificate"). (2) A certificate by the Chief of Records Administration and Information Branch, in the same service, H. L. Hardin.

For convenience's sake these two certificates together comprising Exhibit 1 are herein referred to as the "Loughran certificate" and the "Hardin certificate", respectively.

The Loughran certificate certifies two things:

1. That the attached document (that is, the Hardin certificate denominated "Certificate of Non-Existence of Citizenship Record") is from the files of the Immigration and Naturalization Service;

2. That the signature on the aforesaid document is true and genuine.

Of Loughran's *authority* to make the certificate bearing his signature, appellant raises no question.

The point made by appellant is that however clear the *authority* to make it, the certificate made by Loughran is ineffective and being ineffective, the rest of the exhibit should not have been received in evidence. Appellee nowhere in its brief controverts this claim. Nor does appellee point out that Loughran had the custody of that document to which he certified. This is a prime requisite.

In connection with appellant's contention that Exhibit 1, or any part thereof, should not have been received in evidence, appellee's argument is limited to the admissibility of the portion of Exhibit 1 de-

minated, Certificate of Non-Existence of Record as ade by Hardin.

Appellee argues (pp. 13 and 14) that the require- ent of the statute, the rules, and the regulations on e subject that the certificate of non-existence of cord must *contain a statement* that the certificate is ade "after a diligent search," is complied with be- use of something which Hardin had in his mind. nfortunately the law does not give effect to undis- osed mental reservations. The requirement of all e applicable statutes, rules, and regulations is un- uivocal that not only must there in fact be a diligent arch before the certificate of non-existence is made, t that the fact of such a search shall be stated in e certificate in just so many words.

Appellee argues that substantial prejudice from the ror complained of does not appear and hence is so rmless that it is to be disregarded, citing *Sang Soon ır v. U. S.,* 167 F. (2d) 431; *Ah Fook Chang v. U. S.,* F. (2d) 805; *Wolcher v. U. S.,* 200 F. (2d) 493, all ses decided by this Court, and all remanded for new ial.

In the last of the above listed cases (*Wolcher v. . S.*) this Court said:

> The rule which we endeavor to apply is stated in *Kotteakos v. United States,* 328 U. S. 750, 764; 66 S. Ct. 1239, 1248; 90 L. Ed. 1557: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But

> if one cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The gravamen of appellant's offense is that she falsely claimed American citizenship. To overcome this, since appellee's position is that with a showing of defendant's foreign birth, if for no other reason than to accord her the fundamental and basic right of the presumption of innocence, it was essential to establish that she had not been naturalized. The only proof attempted was in the form of the certificate of non-existence of a record showing such fact. (Ex. No. 1.)

It is respectfully submitted that the reference in Section 290 (d) Immigration and Nationality Act, act of June 27, 1952, Sec. 290 (d), 66 Stat. 234; 8 USC, Sec. 1360 (d) to a showing of "diligent search", is just such "a specific command of Congress" that the Supreme Court of the United States was adverting to in *Kotteakos v. United States, supra.*

II.

ADMISSION IN EVIDENCE OF ORAL AND WRITTEN (EXHIBIT 6) STATEMENTS OF DEFENDANT IN NATURE OF CONFESSIONS.

As to appellee's argument that the admissions complained of "found their way into evidence by responsive answers to questions propounded by appellant," the fact is that the questions propounded by appellant (R. pp. 82-95) were put to him under the circumstances recorded on page 81 of the record, to which appellee makes no reference in its brief.

As it is brief but nonetheless important, it is here set out:

> Mr. Dwight. I will now offer in evidence Plaintiff's Exhibit No. 5 for identification. (Note: This is the "Canadian Passport").
>
> Mr. Soares. Object to it on the grounds that it is incompetent, irrelevant and immaterial and has not been properly identified. And it was taken from the witness under duress and will only serve the purpose of getting admissions or confessions in, and the corpus delicti has not been shown.
>
> The Court. The part of your grounds where you talk about duress, Mr. Soares, there has been no foundation laid that there was no duress. Do you wish to examine the witness on voir dire in that matter?
>
> Mr. Soares. Yes, if the Court please.
>
> The Court. You may.

It will be noted that defendant's examination of the witness Elms on the basis of whose testimony the Canadian passport was received in evidence was confined to the testimony given on direct.

Appellee's statement that, "The appellant is objecting to evidence which was adduced through her own efforts" is wholly untenable and is not borne out by the record.

On the question of admissions and confessions there are here involved two points, namely: (1) that they were not voluntarily made, and (2) that they are not corroborated.

That they were not voluntarily made amply appears. While no physical violence was offered, defendant did not have that "mental freedom" which the Supreme Court has said a defendant must possess to make the admissions and confessions admissible. (*Ashcraft v. Tennessee,* 322 U.S. 145, 88 L.Ed. 1192; and *Lyons v. Oklahoma,* 322 U.S. 596, 88 L.Ed. 1481.)

It is also well-settled that even when admissions and confessions are otherwise admissible, they cannot be received as evidence unless corroborated. Despite the tendency of the Courts to be less stringent as to the *quantum* of corroborating evidence, so far as appellant has been able to ascertain no Appellate Court has ever held that evidence erroneously received may be used as corroboration.

III.

Specification No. 3, claiming error in the refusal of defendant's requested instruction No. 18 is withdrawn at this time.

CONCLUSION.

ppellant again respectfully submits that a new l should be granted.

ated, Honolulu, Hawaii,
May 21, 1956.

Respectfully submitted,
O. P. Soares,
Attorney for Appellant.